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OCTOBER TERM, 1950 51

No. 773 86

HOWARD HUGHES,

Appellant,

vs.

THE UNITED STATES OF AMERICA

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

STATEMENT AS TO JURISDICTION

**T. A. SLACK,
LEONARD P. MOORE,
Counsel for Appellant.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 773

HOWARD HUGHES,

vs.

Appellant,

THE UNITED STATES OF AMERICA

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended appellant, Howard R. Hughes, submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause:

Opinion Below

The final judgment appealed from was entered without opinion by the District Court for the Southern District of

New York, composed of three judges. Attached hereto as Appendix A and in the order named are:

1. Section V of the Consent Decree of November 8, 1948, being the entire agreement of Hughes and the portion of the decree material.

2. The Stipulation of the parties filed December 28, 1950 which was adopted as the order of the Court appointing the trustee to hold the Hughes stock here involved.

3. The Motion of the Attorney General of the United States dated January 11, 1951 to require the trustee to sell the Hughes stock.

4. The replies of Howard R. Hughes to such motion of the Government, dated February 9, 1951 and February 21, 1951.

5. A copy of the Court's final judgment dated March 24, 1951 ordering the trustee to dispose of the Hughes stock and from which this appeal is taken.

Jurisdiction

The final judgment of the District Court requiring the voting trustee to dispose of the Hughes stock (called an "Order") was entered on March 24, 1951. The jurisdiction of the Supreme Court to review this decree by direct appeal is conferred by Title 15 United States Code Section 29 and by Title 28 United States Code Section 1253.

This is a suit in equity brought in the District Court of the United States wherein the United States is complainant and it was brought under the Sherman Anti-Trust Act. That the "Order" appealed from is in fact a "final judgment" and therefore that the Supreme Court has jurisdiction to review such judgment on direct appeal in this case is supported by the following authorities among others:

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120;
89 L. Ed. 2092;
Chrysler Corporation v. United States, 316 U.S. 556;
86 L. Ed. 1658.

That the jurisdiction of the Supreme Court to review the judgment on direct appeal exists also by virtue of Section 1253 of Title 28 U.S.C. is apparent although such section has yet to be construed in a similar case.

Question Presented

Howard R. Hughes, not theretofore a party to a civil anti-trust suit against a corporate defendant, voluntarily entered his consent to a decree which required him to deposit in a voting trust certain stock of a corporation to be acquired by him. The consent decree specifically provided that the voting trust should "remain in force until *Howard R. Hughes* shall have sold his holdings * * *". After enumerating certain other specific characteristics and having so specified the duration of the prospective voting trust the consent decree then provided that the trust should be upon "such *other* terms or conditions. * * * as shall be prescribed by the Court". The question presented is whether the District Court, upon simple motion of the Government and without hearing competent evidence of any kind and in the absence of any previous findings of facts relating to the right of Howard R. Hughes to continue to own such stock, may in effect decree the confiscation of the stock by an "Order" to the Court's trustee to dispose of it.

Statutes Involved

The action was filed under the Sherman Anti-Trust Act (15 U.S.C. Sections 1, 2, and 4), but appellant was not a party to the action prior to the consent decree nor has there ever been any evidence or adjudication of any violation of the Act on the part of Appellant.

Statement

The order of the District Court here brought into question comes after some years' history of litigation between the United States and various corporations in the motion picture industry, including the defendant in this severed cause, Radio-Keith-Orpheum Corporation and certain of its wholly owned subsidiaries.

The United States alleged many violations of the Sherman Act on the part of the defendants and alleged that integrated ownership of the production end of the motion picture business and the exhibiting end of the business by these corporations constituted a monopoly.

No stockholders of any of the defendant corporations were made parties. There have never been allegations, evidence, or findings of fact which would reach the stockholders of the defendants or would suggest that any individual stockholding constituted a violation of law.

Of the history of the case it is material here only that in 1944 the Attorney General filed a certificate under the Expediting Act and the Three Judge Expediting Court from which this appeal is taken was convened.

Prior to November 8, 1948 the consent decree involved in this appeal was negotiated between the United States and the Radio-Keith-Orpheum Corporation defendants. Under this consent decree certain future practices were permitted and others were enjoined, also a contemplated plan of reorganization of RKO was referred to and the completion of this plan of reorganization was made a condition to the continued force and effect of the consent decree. The reorganization contemplated two new corporations to replace the then single parent corporation and to be owned by the stockholders of the then single parent.

As a part of the agreement of settlement between RKO defendants and the United States, Howard R. Hughes voluntarily became a party to the consent decree for the limited purpose of making certain agreements with respect to certain stock of the two new companies which would be issued to him as a result of the RKO reorganization.

The appearance or consent of Howard R. Hughes, who was theretofore not a party to the proceedings, was in words as follows:

"I hereby consent to the entry of section V of the above decree:

HOWARD R. HUGHES,
By RALSTONE R. IRVINE,
His Attorney"

Section V of the consent decree constituted the entire agreement of the parties with respect to the Hughes stock and the only portion of the consent decree which referred to it.

Such section *clearly recognizes the possibility that Hughes might retain his holdings in both of the new companies* created as a result of the reorganization. It then *specifically provides what shall happen in that event, i. e.,* he shall "Deposit with a trustee * * * all of his shares of the New Picture Company or the New Theatre Company, * * * under a *voting trust* agreement whereby the trustee shall *possess and be entitled to exercise* all the *voting rights* of such shares, including the *right to execute proxies and consents* with respect thereto. Such voting trust agreement shall thereafter *remain in force* until *Howard R. Hughes* shall have sold his holdings * * * of the New Picture Company or the New Theatre Company * * * and upon such sale * * * such voting trust agreement shall automatically terminate * * *".

Having set forth clearly the basic purpose, characteristics and duration of the trust, Section V then provides: "Such trust shall be upon such *other* terms or conditions, including compensation to the trustee, as shall be prescribed by the Court". This provision was for the obvious purpose of providing the necessary power to implement the trust *within the framework of its expressed provisions, purposes and limitations.*

That there might be no doubt as to the limitations on the trustee's powers with respect to the stock or the proceeds of any sale *by Hughes*, it was then provided: "During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends) * * * on account of the trustee's shares, and proceeds from the sale thereof".

On December 28, 1950 the District Court entered its order (agreed to by the parties) appointing a trustee for the stock of Howard R. Hughes in the New Theatre Company. This order was in strict conformity with the consent decree and contained no provision for sale. In the document constituting such agreement for the appointment of the trustee, the Attorney General stated that he would file a motion to require the sale of this stock and Hughes stated simply that such motion would be opposed.

Upon the entry of the order, Hughes delivered to the trustee nearly one million shares of the capital stock of the New Theatre Company worth, according to the open market quotations of the day, approximately \$4,000,000. This stock is still in the possession of the trustee.

Such stock having been delivered to the trustee under the order of the District Court, which in no way violated the terms of the consent decree, the Attorney General filed a motion for an "amendment to the order appointing the trustee" which would direct the trustee, after the passage of two years' time, no longer to hold the stock of Howard

Hughes under the voting trust as provided in the consent decree, but to "dispose of it".

Although this motion by the Attorney General purported to be supported by an affidavit attached, even this incompetent document contained no statement, allegation, or assertion of any changed conditions or any supposed justification for the confiscation sought except that in the "considered opinion" of the particular assistant Attorney General who filed the motion and signed the affidavit the stock of Hughes should be sold by the trustee in order to accomplish complete divorcement of the RKO Picture Company from the RKO Theatre Company. Even the affidavit contained no assertion of fact which was not obviously in the contemplation of the parties as well as the Court at the time of the entry of the consent decree.

Thus, having in good faith entered into an agreement with the representatives of the United States in order to settle litigation to which he was not a party, Howard R. Hughes consented to deprive himself of the voting power which was otherwise incident to his ownership of corporate stock. The parties carefully specified the substance of Hughes' agreement, namely, that if he had not disposed of his stock prior to a certain date he would "Deposit with a trustee . . . all of his shares of the New Picture Company or the New Theatre Company . . . under a voting trust agreement . . ." which would "remain in force until Howard R. Hughes shall have sold his holdings . . ." of one or the other of the companies.

Having thus clearly outlined and defined the basic purpose, characteristics, and duration of the trust, the Hughes agreement and the consent decree then provided that such trust should be "upon such other terms, or conditions . . . as shall be prescribed by the Court".

Thus, the limitations upon the agreement of the parties with respect to the Hughes stock were carefully prepared with respect to the essential terms and conditions of the trust. In order to give the Court power to implement the agreement as made it was provided that the Court should supply the remaining terms, obviously to accomplish the stated purpose and within the stated limitations.

Having so carefully sought to define his agreement and protect his property rights, Hughes now finds that neither the other party nor apparently the District Court attaches any sanctity whatever to the agreement as made, that it is now treated as a meaningless thing except insofar as it was useful in bringing him within the jurisdiction of the Court, causing him to surrender possession of \$4,000,000 worth of his property, and empowering the Court thereafter upon mere motion of the Attorney General to decree the confiscation or forced sale of his property. All of this is notwithstanding the complete absence of any evidence or findings of any kind that his ownership of such stock constituted any violation of law.

The Court's judgment which is here appealed from directs the trustee "that if the stock trusted shall not have been disposed of by Howard R. Hughes by February 20, 1953 the trustee shall dispose of such stock within two years thereafter". Under this decree, Hughes must now either sell his investment—whether he wants to or not—regardless of the market conditions, or suffer it to be sold by the trustee.

The Direct Appeal Lies under Section 29, Title 15, United States Code

No consideration of form nor technicality of procedure should be permitted to disguise or conceal the true nature of the judgment appealed from. It is immaterial that the

immediate "Order" of the Court was in form directed to the Court's trustee. The results here are no different than if the form of the Attorney General's motion had been for an amendment to the consent decree so that it would provide for the sale of the Hughes stock by the trustee in place of the existing provision that it should be held in a voting trust "until Howard R. Hughes shall have sold his holdings".

The unquestionable and unequivocal result of the "Order" is that the consent decree is modified so that in lieu of the limited restrictions upon his rights of ownership as provided in the consent decree Hughes must now dispose of his stock by February 20, 1953 or suffer forced sale thereof.

The "Order" appealed from meets every requirement of a final judgment according to the many analyses and treatments of that term which have been handed down by the Supreme Court. Its effect was to amend the consent decree as was done in *Chrysler Corporation vs. United States*, 316 U.S. 556, and in *Ford Motor Company vs. United States*, 335 U.S. 303.

It was only upon the entry of this "Order" that for the first time there existed the characteristics referred to by the Supreme Court in *Radio Station WOW, Inc. vs. Johnson*, 326 U.S. 120, namely, that Hughes, by decree of the Court, has been required to transfer possession of his property to the Court's trustee and the trustee has been unequivocally ordered to sell it unless Hughes himself sells it.

In *Republic Natural Gas Co. vs. Oklahoma*, 334 U.S. 62, Mr. Justice Frankfurter recognized the instances where the Supreme Court "has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party

would be irreparably injured if review were unavailing" and said "For related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow".

Hughes has no remedy except a direct appeal to this Court. Otherwise he must dispose of some \$4,000,000 or more of stock within a period of less than two years, regardless of market conditions and under the disadvantage of a court decree that if he does not sell it, it will go under a forced sale.

No further action is contemplated by the order appealed from except to see that the vendee of such stock would not be placed in violation of the anti-trust laws by its purchase.

The Direct Appeal Lies under Section 1253, Title 28, United States Code

Section 1253 provides for a direct appeal "from an order granting or denying an interlocutory or permanent injunction in any civil action . . . required by any act of Congress to be heard and determined by a District Court of three judges".

In this case a certificate was filed by the Attorney General under the Expediting Act and all proceedings thereafter were required by Section 28 of Title 15, United States Code (the Expediting Act). Not only is the order appealed from in fact a mandatory injunction that the stock shall be sold, but it is an amendment to the consent decree which also enjoins. We believe there are no authorities for or against jurisdiction here under Section 1253 but the language of the section seems clear.

The Questions Are Substantial

Aside from the injury to the individual appellant resulting from the decree of a forced sale of this large property the question here is of great importance.

Obviously, voluntary settlement of litigation should be encouraged and the consent decree should continue to be, as it has been in the past, a means or device to accomplish settlements of large scale disputes.

The proceedings involved in this appeal make it apparent that the present concept of the office of the Attorney General of the United States is that a consent decree over which the court has continuing jurisdiction is something utterly lacking in stability or in the quality of permanently settling any of the issues that existed between the parties. As authority for this shocking concept the Attorney General will, no doubt, cite *Chrysler Corporation vs. United States*, 316 U. S. 556.

Although the Assignment of Errors here (to the general effect that the Court has overridden and nullified the clear provisions of the consent decree upon mere unsupported motion of the Attorney General and without according to the aggrieved party the right of a trial to determine the facts) are unquestionably similar to the Assignments in the *Chrysler* case, there is no further similarity between the issues in the two cases.

In the *Chrysler* case the consent decree was amended as to the date upon which it would become ineffective unless General Motors Corporation were, by judgment, also brought under the control of similar restrictions.

The *Chrysler* case is different from the case at bar in that there the Government did introduce evidence in the form of a transcript of its proceedings against General Motors to show the facts relating to its efforts touching the condi-

tions of the consent decree. All of the facts upon which the determination was made were a matter of record before the Court and there were *findings of fact* and conclusions of law. In the case at bar, there is no competent evidence but merely an affidavit by an Assistant Attorney General containing some statements proved by the record itself to be erroneous and containing no statements which, even if competent as evidence, could form a lawful basis for the judgment appealed from.

We are here confronted with a shocking example of arbitrary action of a type which was thought by Mr. Justice Frankfurter to be the basis for his strong dissent in the *Chrysler* case.

Unquestionably it is and has been the law that a consent decree, though the jurisdiction of the court entering it may continue for certain necessary purposes, nevertheless settles the rights of the parties therein treated except upon a showing of changed conditions which were unforeseen at the time of the decree and which upon hearing make it seem equitable that the original decree should be set aside, modified, or replaced. Such was the clear holding of *United States v. Swift and Co.*, 286 U. S. 106, *United States v. International Harvester Co.*, 274 U. S. 693, and *Ford Motor Company v. United States*, 335 U. S. 303.

Appellant does not contend that a consent decree is any more or less subject to modification by the Court having continuing jurisdiction than is any other decree. He contends merely that in either case a modification thereof to the detriment of any party thereto may be made only upon proper showing and such was not even attempted here.

If the judgment here appealed from can stand, then consent decrees in equity cases involving injunction or, indeed, in any case of continuing jurisdiction, must be meaningless things to which no sane person would become a

party and thereby subject himself to unknown and undefined hazards with no guaranty of the protection of his rights by lawful processes.

Clearly the District Court should not have ordered the sale of the Hughes stock without requiring the United States to show by competent evidence why such a departure from the terms of the consent decree should be had. The sanctity and effect of consent decrees which settle important litigation should, at least to this extent, be clarified on this appeal.

Respectfully submitted,

(S.) T. A. SLACK,

Counsel for Appellant,

Howard R. Hughes;

(S.) LEONARD P. MOORE,

Atty. for Appellant.

25 Broadway,

New York 4, N. Y.

T. A. SLACK,

7000 Romaine Street,

Hollywood 38, California.

APPENDIX "A-1"

EXCERPT FROM CONSENT DECREE

V

Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of eighteen months from the date hereof, Howard R. Hughes shall either:

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theatre Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of Section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees:

* "eighteen months" added and "one year" deleted by order dated October 10, 1949.

APPENDIX "A-2"

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87273

UNITED STATES OF AMERICA, *Plaintiff,*

against

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

STIPULATION

It is hereby stipulated and agreed between the plaintiff and Howard R. Hughes that pursuant to Section V of the consent judgment entered in this cause on November 8, 1948, as amended:

1. The name of Irving Trust Company located at 1 Wall Street, New York, New York is hereby suggested to this Court as trustee to take over and hold stock held by Howard R. Hughes in the New Theatre Company.
2. It is also agreed that if said Irving Trust Company is not satisfactory to this Court as trustee herein, the parties shall, within two weeks after being so advised by the Court, suggest to the court three other names for consideration as trustee.
3. The trustee shall have power to vote the stock in such manner as in the opinion of the trustee shall be in the best interests of the corporation and not inconsistent with the provisions of this judgment.
4. The stock shall be issued to and shall stand in the name of the trustee as such upon the books of the New Theatre Company, but Howard R. Hughes shall remain the equitable owner.
5. The compensation of the trustee is to be commensurate with services performed and is to be fixed by the Court upon termination of the trust or at such other times as the Court may deem proper upon motion of the trustee.
6. During the existence of the trusteeship, the trustee shall not have any financial interest in the New Picture

Company or the New Theatre Company by way of loans, stock or bond interests, or by way of being represented in the New Picture Corporation through the board of directors or officers. If the trustee is empowered to sell said stock, then at such time as it shall have such power, the trustee shall have no representative on the Board of Directors or as officer of the New Theatre Company. It is also agreed that the trustee, during the period of trusteeship, shall not be connected with Howard R. Hughes by way of loans or participation in enterprises in which Howard R. Hughes is a substantial or controlling stockholder.

7. It is understood by the parties that the plaintiff will move this Court by formal motion returnable during the month of January for an order providing that the terms of this trusteeship shall include a provision empowering and requiring the trustee, if Howard R. Hughes shall not have disposed of it, to sell the stock entrusted to him under the terms and conditions to be established by this Court, at any time after one year from the date of entry of an order upon the government's motion. Howard R. Hughes will contest such motion.

T. A. SLACK,
Attorney for Howard R. Hughes.
PHILIP MARCUS,
Attorney for Plaintiff.

So ordered as to Paragraphs 3, 4, 5, 6, and 7. The Irving Trust Company is hereby appointed trustee, as suggested in Paragraph 1 of the above stipulation.

AUGUSTUS N. HAND,
U. S. C. J.
HENRY W. GODDARD,
U. S. D. J.
ALFRED C. COXE,
U. S. D. J.

U. S. D. J. Filed Dec. 28, 1950. S. D. of N. Y.

APPENDIX "A-3"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

MOTION

Please take notice that upon the affidavit of Philip Marcus, annexed to and made part hereof, and upon all the pleadings and proceedings had herein, the plaintiff will move this Court on the 15th day of February, 1951 at 4 P. M. or as soon thereafter as counsel may be heard, at the Federal Court House, Foley Square, New York City, for the entry of the order attached hereto, amending the order of December 28, 1950; by requiring the trustee of the stock held by Howard R. Hughes in the New Theatre Company to dispose of such stock.

(S.) PHILIP MARCUS,
Attorney for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

ORDER

The Court having considered the motion of the plaintiff, and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that, if the stock trustee shall not have been disposed of by Howard R. Hughes by February 20, 1953 the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered on November 8, 1948 and the other judgments entered in this cause. Disposition may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and, so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed dispositions of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

United States Circuit Judge.

United States District Judge.

United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., Defendants.

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

Philip Marcus, being duly sworn, deposes and says that he is attorney for the plaintiff in the above entitled cause and is familiar with the facts herein recited.

A consent judgment signed personally by Howard R. Hughes was entered by this Court against RKO and Howard R. Hughes on November 8, 1948. Under the terms of Section V of that order, Howard R. Hughes was required within a period of one year from the date of the entry of the judgment to dispose of his holdings of the stock in either the New Picture or the New Theatre Company or deposit with a trustee designated by the Court the shares of stock in one of the companies. Section V also provided that the trust agreement should remain in force until Howard R. Hughes had sold his stock and that the trust should be upon such other terms and conditions as should be prescribed by the Court. This Section also states that during the period of the trust Howard R. Hughes should be entitled to receive the proceeds of the sale of the stock as well as dividends and other distributions made on account of the trustee shares.

More than two years have elapsed since the entry of the judgment of November 8, 1948, without a sale of the stock or any part of it being made by Howard R. Hughes. Only very recently was the stock trustee. Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment. At that time he gave a commitment not to ask a further extension. That commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950. During the course of the argument, however, Howard R. Hughes, by his attorney, withdrew his motion and subsequently filed with this Court a letter of May 5, 1950, in which he stated he would trustee his theatre stock.

At the end of last year, RKO separated into a New Picture Company and a New Theatre Company.

It is affiant's considered opinion that there can be no real separation of the RKO Picture Company from the RKO Theatre Company and no complete termination of control of both those companies by Howard R. Hughes, while the latter may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company. Howard R. Hughes has already

filed a statement with this Court that he intends to remain with the Picture Company. Yet if he can merely trustee his stock in the Theatre Company, he can continue under the terms of Section V of the consent judgment to draw dividends from the Theatre Company, and thus he and the Picture Company will continue to have a very real interest in the financial success of the Theatre Company.

The proposed order would give Howard R. Hughes another year within which to endeavor to dispose of the stock, at which time three years from the date of entry of the judgment would have elapsed, during all of which period Howard R. Hughes would have been entitled to draw dividends from the Theatre Company as well as from the Picture Company. The proposed order provides that after such time the trustee shall, as expeditiously as possible, take all necessary steps to dispose of the stock, having in mind that dispositions should not be made which would unreasonably restrain competition. The proposed order also provides that to the extent possible dispositions should be made which would not cause a sacrifice to Howard R. Hughes, but at any rate disposition of the stock should be made within a period of two years from December 29, 1951.

(S.) PHILIP MARCUS,
*Special Assistant to the
Attorney General.*

Sworn and subscribed to before me this 11th day of January 1951.

(S.) HARRY J. PIZZA.

My commission expires — — , — — .

APPENDIX "A-4"

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RADIO-KEITH-ORPHEUM CORPORATION, ET AL., *Defendants.*REPLY TO MOTION OF UNITED STATES OF AMERICA TO AMEND
CONSENT DECREE TO REQUIRE SALE OF NEW THEATRE
COMPANY STOCK

Howard R. Hughes, without consenting to the trial or determination by this Court in this proceeding of any matters beyond the scope of the expressed terms of the Consent Decree, appears herein specially and moves the Court to dismiss or, in the alternative, to deny the motion of the United States of America referred to in the caption upon the following grounds which will appear as a matter of record in the cause or from the affidavit attached hereto:

1. The Court is without jurisdiction in a proceeding of this kind to alter or enlarge upon the terms of the Consent Decree respecting the liabilities or obligations of Howard R. Hughes, who is a party hereto only to the extent of his voluntary consent.

2. The Consent Decree was no more than a contractual settlement of the pending case to which the Court gave its sanction and to which, *as it was written*, Howard R. Hughes entered his consent. No forced sale of the stock was contemplated by the Consent Decree and the Court has no jurisdiction in a proceeding of this kind to enter any order or to require the performance of any act not reasonably necessary to carry out the *expressed terms of the Consent Decree*.

3. In any event the motion of the United States of America is premature because:

(a) The New Theatre Company stock has not been in existence except since January 1, 1951.

(b) There is no showing that Howard R. Hughes is not making a bona fide effort to dispose of one or the other of the stocks which he received in exchange for his old Radio-Keith-Orpheum Corporation stock.

(c) This proceeding could be as well brought for all purposes at a later date as at the present time.

(d) A present order such as is sought by the United States of America would be an unfair detriment to a free market for Howard R. Hughes.

4. The order requested by the United States of America would be in violation of the expressed terms of the Consent Decree because it would require sale of the New Theatre Company stock by the trustee even though Howard R. Hughes should prior to that time have disposed of the New Picture Company stock.

(S.) T. A. SLACK,
Attorney for Howard R. Hughes.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

AFFIDAVIT

STATE OF CALIFORNIA,

County of Los Angeles, ss.

T. A. Slack being first duly sworn upon oath deposes and says:

1. That he is an attorney at law, a member of the Bar of the State of Texas, and has the permission of this Court to appear herein as the attorney for Howard R. Hughes.

2. Prior to the entry of the Consent Decree of November 8, 1948 in the above cause deponent represented Radio-Keith-Orpheum Corporation in its negotiations with the Department of Justice of the United States and with the

Commissioner of Internal Revenue of the United States pertaining to a settlement of the above cause insofar as it affected Radio-Keith-Orpheum Corporation. After extensive negotiations, the terms of the Consent Decree were mutually agreed upon by the Department of Justice and Radio-Keith-Orpheum Corporation, subject to the approval of this Court. The other terms of the agreement between the parties, however, at the insistence of the Department of Justice were made subject to incorporating in the Consent Decree Paragraph V thereof (affecting certain stock owned by Howard R. Hughes), and to the consent of Hughes to the entry of the decree.

3. In order to facilitate the settlement of the cause as between the two parties mentioned, Howard R. Hughes did agree to entry of the decree as it was and is written, but at no time did he make any other agreements respecting his stock interest in the defendant corporation and particularly did he not agree that he might be required to sell any of such stock at any time.

4. To the best of affiant's knowledge and belief, at the time the Consent Decree was entered there had been no agreement of settlement reached between the United States and any other defendant in the cause and no other defendant had agreed to a divorcement between its producing and exhibiting properties. At that time there had been no order of any Court which determined, or gave any substantial indication, that the United States might be successful in its efforts to cause a divorcement between the two types of properties.

5. It was against this background which existed at the time that the duly authorized representatives of the United States freely expressed in the presence of this affiant that the Consent Decree affecting the divorcement set forth therein with respect to RKO would be of substantial advantage and weight in favor of the Government's contentions for divorcement in the cases of the other defendants.

6. At no time at or prior to the entry of the Consent Decree was it ever suggested that Howard R. Hughes would be considered to have any obligation with respect to any of his stock other than those therein set forth. It is not be-

lieved to have been in the minds of any of the parties to the negotiations and certainly was not in the mind of this affiant or Howard R. Hughes that the provision in the Consent Decree relating to the voting trust, viz., "Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court" was anything more than an expression of the necessarily implied powers of the Court to implement the expressed purpose of the trust by any necessary details such as compensation of the trustee, qualifications, etc. No basic right or obligation was contemplated which was not set forth in the decree.

7. The Honorable Attorney General is mistaken in his affidavit that "Howard R. Hughes in 1949 secured from this Court an extension of time with respect to his obligations under Section V of the consent judgment". The record speaks for itself on the fact that Howard R. Hughes has at no time appeared in this cause or before this Court for any purpose other than to enter his formal consent to the agreed judgment or to agreements or motions filed herein by RKO. Such formal consent by Howard R. Hughes has been necessary in each case because he would not receive his stock in the new companies until after reorganization and any postponement of reorganization necessarily had to postpone the date upon which the new stock which would be issued to him would have to be deposited in the voting trust.

8. When RKO asked for an extension in September of 1949 the Attorney General requested and received from Howard R. Hughes a letter dated September 30, 1949 which was as follows:

"The Attorney General
Department of Justice
Washington, D. C.

United States of America v.
Paramount Pictures, Inc., et al.

Dear Sir:

On behalf of Mr. Howard R. Hughes I am authorized to state to the Department of Justice as follows:

1. In the event that the application of RKO for amendments of the RKO Consent Decree is approved by the Court,

to which amendments Mr. Hughes consented, he will not petition for further extension of the time provided for in Section V of such Decree, within which he must comply with such Section.

2. In making this statement, it is our understanding that if prior to May 8, 1950 Mr. Hughes has not received the stock of the New Theatre Company and the New Picture Company issuable under the Plan of Reorganization, he will comply with the requirements of Section V B of such Decree if he shall file with the Court by such date a statement that he has elected to deposit with the trustee designated by the Court, in accordance with Section V B, his shares of the New Picture Company or the New Theatre Company, as he may elect, when issued to him pursuant to the plan, subject to his right to sell prior to such deposit in accordance with Section V A of such Decree.

Very truly yours,

(S.) RALSTONE R. IRVINE,
Attorney for Howard R. Hughes."

The Honorable Attorney General is again mistaken in his affidavit that "That commitment was repudiated by Mr. Hughes by a motion on his behalf which was made and argued before this Court on April 19, 1950". The record will show that upon the date in question the defendant *Radio-Keith-Orpheum Corporation* again petitioned this Court for an extension of the time within which it was required to accomplish the separation of its two activities and that again this motion was based entirely upon what was in the supposed best interests of the corporation. Howard R. Hughes was not a party to such motion except to indicate his consent.

9. Since entry of the Consent Decree there have been several negotiations for the purchase of the New Theatre Company stock owned by Howard R. Hughes upon a "when issued" basis. Because New Theatre Company could not come into existence until reorganization and because of the closely integrated capital structure which existed prior to reorganization, extremely difficult problems arose in connection with any contemplated sale by Hughes. From a

practical standpoint, nothing could be transferred to any purchaser in the way of stockholders' rights normally incident to the stock. The actual properties of the theatre corporation necessarily had to remain under the operation and control of its parent until reorganization. It was only on January 1, 1951, that the New Theatre Company stock which has been trusted by Hughes, was actually issued to him so that a completed sale thereof could actually be accomplished.

10. For many months past, and during negotiations looking toward the possible sale upon a future basis of the New Theatre Company stock by Hughes, there have been persistent statements and misunderstandings to the effect that Howard R. Hughes would be "forced" to sell his stock in one or the other of the companies by various dates which more often than not were named as December 31, 1950. It seemed that no denials or explanations were sufficient to put down this false concept which was the subject of so often repeated assertions.

11. In the opinion of affiant, either the fact or false conclusions that Hughes would be under a compulsion to sell a block of stock of this size and type would necessarily affect adversely the market for it.

12. It is the opinion of affiant that an order of this Court such as that urged by the United States would uselessly tend to depress the possible market for the New Theatre Company stock and would only tend to defeat its own purposes. It is impossible to enter an order which would establish a time limit within which sale of stock would be forced without destroying the right to a free market which Howard R. Hughes possesses under the terms of the Consent Decree.

(S.) T. A. SLACK.

Subscribed and sworn to before me this 9th day of February, 1951:

[SEAL.]

(S.) JOHN S. HODGE,
Notary Public in and
for the State of California,
County of Los Angeles.

My Commission Expires October 19, 1951.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

REQUESTS TO FILE SUPPLEMENTAL AFFIDAVIT

T. A. Slack, attorney for Howard R. Hughes in the above cause, requests leave of the Court to file herein, before rendition of the final judgment, the supplemental affidavit attached hereto in order that there may be no misunderstanding of the position and contention of Howard R. Hughes.

(S.) T. A. SLACK,
Attorney for Howard R. Hughes.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

RADIO-KEITH-ORPHEUM CORPORATION, et al., *Defendants*

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

T. A. Slack, attorney for Howard R. Hughes, being duly sworn on oath deposes and says:

The Government's affidavit and motion is to obtain modification of the terms of the trust in a manner not contemplated

plated by the Consent Decree. It fails, however, to allege or set forth any change in the present conditions from those which existed at the time of the entry of the Consent Decree. Nor does it set forth any facts which were not clearly foreseeable at such time.

The affidavit of Government's counsel sets forth only two facts which are (1) Hughes has not sold the stock in New Theatre Company and (2) Hughes will receive any dividends from such stock.

The first fact was expressly contemplated in the Consent Decree and the consequences were prescribed. That the second fact would be true was recognized and prescribed for in the Consent Decree.

Thus, the Government's support of its motion is nothing but the "considered opinion" of its present counsel that there can be no "real separation" of RKO Pictures Company from RKO Theatres Company and no "complete termination of control of both these companies" by Mr. Hughes while he "may retain a substantial financial interest in both companies without a requirement to dispose of his interests in either company". The considered opinion of counsel who represented the Government when this Consent Decree was signed was to the contrary. Then, the Government considered that its interests would be fully protected without a requirement that Mr. Hughes dispose of his stock interest in either company. Consequently, the Consent Decree gave Mr. Hughes an option either to dispose of his holding of the stock of one or the other of the companies or to deposit the shares of one with a trustee under a "voting trust".

Howard R. Hughes has expressly declined to consent to any determination of his rights in this proceeding. An order may not be made effectively modifying the terms of the Consent Decree because there has been no satisfactory showing by competent evidence in a proceeding for that purpose that there have been such changes in the conditions which require such modification.

The Consent Decree sanctioned an agreement between the United States of America and the other parties thereto in

which substantial benefits were derived by all parties and the Government may not now seek to withdraw from its agreement; in any event without a relitigation of the entire matter.

(S.) T. A. SLACK.

Subscribed and sworn to before me this 21st day of February, 1951.

(S.) DOROTHEA A. O'BRIEN,
Notary Public.

Dorothea A. O'Brien, Notary Public, State of New York No. 24-2925000, Qualified in Kings County Certs. filed with Kings Register and New York County Clerks and Register. Commission expires March 30, 1951.

APPENDIX "A-5"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

against

RADIO-KEITH-ORPHEUM CORP., et al., *Defendants*

ORDER

The Court having considered the motion of the plaintiff and after hearing argument in support of the motion and in opposition thereto,

It is ordered that the Order entered in this cause on December 28, 1950 appointing a trustee, be and is amended by providing that if the stock trustee shall not have been disposed of by Howard R. Hughes by February 20th, 1953, the trustee shall dispose of such stock within two years thereafter. Such disposition shall not be inconsistent with the terms of the judgment entered in this cause. Disposition

tion may be made of the entire stock as a unit or any lesser amount. The stock shall be disposed of expeditiously, and so far as possible without sacrifice to the beneficial owner but at any rate within said two year period. The trustee shall submit for the approval of the Court, upon notice to Howard R. Hughes and the Attorney General, proposed disposition of stock, and no disposition shall be approved unless the Court finds it will not unreasonably restrain competition.

Dated: March 24, 1951.

(S.) AUGUSTUS N. HAND,
U. S. Circuit Judge.

(S.) HENRY W. GODDARD,
U. S. District Judge.

(S.) ALFRED H. COXE,
U. S. District Judge.

(5205)

